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No. 86-848

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

JUDE R. HAYES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether warrants that authorized the search of petitioner's medical offices for records documenting the purchasing, dispensing and prescribing of controlled substances were overbroad under the Fourth Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 79-116) is reported at 794 F.2d 1348. The opinion of the district court (Pet. App. 28-78) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1986. A petition for rehearing was denied on October 1, 1986 (Pet. App. 117-118). The petition for a writ of certiorari was filed on November 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on 281 counts of unlawfully dispensing controlled substances, in violation of 21 U.S.C. 841(a)(1).[1] Petitioner

[1] Petitioner was charged with 640 counts of unlawful distribution of controlled substances. The jury acquitted petitioner on eight counts,

was sentenced to three years' imprisonment, a $100,000 fine, a special parole term of three years, and a consecutive term of three years' probation. The court of appeals affirmed (Pet. App. 79-116).

1. On July 28, 1982, the government secured warrants to search petitioner's medical offices in Farmersville, Ivanhoe, and Porterville, California. In support of the warrants, the government submitted the affidavit of Craig C. Winstead, a Special Agent with the California Bureau of Narcotic Enforcement, together with several attachments. Agent Winstead's affidavit recited, at the outset, that one of petitioner's patients had told a Bureau of Narcotics Enforcement agent that petitioner had prescribed Dilaudid, Percodan, and Demerol for him without a prior physical examination. As a result of the prescriptions, the affidavit stated, the patient had become addicted to Percodan. An examination of triplicate prescriptions filed with the Bureau of Narcotics Enforcement confirmed that petitioner had prescribed those drugs for the patient (Winstead Aff. at 1).

Thereafter, the affidavit reported, a deputy from the Tulare County Sheriff's Department, acting in an undercover capacity, went five separate times to petitioner's Porterville office and requested prescriptions for Percodan. On the first visit, petitioner issued a prescription for another drug, Vicodin, without performing a physical examination and in the absence of any medical indication for the drug. Later the same month, and on three separate occasions thereafter, the undercover deputy again requested Percodan prescriptions. Each time petitioner issued the requested prescription without performing a

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and it was unable to reach a verdict on 274 counts. Prior to trial, the government moved to dismiss 77 of the counts. Following trial, the government moved to dismiss the 274 counts on which the jury could not reach a verdict.

physical examination, and in the absence of any indicated medical need for the drug. Winstead Aff. at 1-3.[2]

According to the affidavit, the California Bureau of Narcotic Enforcement subsequently gathered from its files copies of prescriptions for Schedule II drugs issued by petitioner and filled by pharmacies between February and September 1981. Authorities also secured from 15 pharmacies in Tulare County an additional 5,211 prescriptions issued by petitioner for controlled substances. From those records, investigators developed 75 patient profiles. For each profiled patient, the investigators indicated the quantities of drugs prescribed and the frequency with which prescriptions had been issued. The investigators then sent the profiles to a medical consultant. The consultant concluded that it was "highly probable" that in 58 of the 75 profiled cases petitioner had "caused, abetted, or prolonged addi[c]tion or habituation to controlled substances." Winstead Aff. at 3-4.

The affidavit further recited that federal agents had learned from petitioner's Porterville receptionist that half of petitioner's patients were either present or former heroin addicts; that petitioner had in the past run a methadone clinic in Tulare County and was presently treating some of his former patients from that clinic; and that petitioner operated offices in Ivanhoe and Farmers-

[2] During the deputy's visit to petitioner's office in October 1981, petitioner inquired whether she had located her X-rays. When she said that she had not, petitioner said that he did not need them. He then filled out a prescription for Percodan while at the same time taking a phone call from his bookkeeper. The next month, petitioner prescribed more Percodan after inquiring whether the deputy had any "serious problems" and learning that she had none. Finally, in December 1981, the deputy told petitioner that she could not afford to have X-rays taken. Petitioner said that this was "okay" but that the deputy would have to get some X-rays because petitioner needed documentation to justify to state authorities his prescription of Schedule II narcotics. See Exhs. C, D, and E to the Winstead affidavit.

ville, as well as Porterville, and that he employed other doctors at those offices. The affidavit also noted that while agents were checking prescriptions written by petitioner, they discovered several prescriptions for Schedule II drugs that had been issued by doctors working for petitioner at his various offices; the medical consultant concluded that some of those prescriptions had been written for patients whom the consultant determined to be addicted to controlled substances. Winstead Aff. at 4-5.

Based on the affidavit, the magistrate issued warrants to search each of petitioner's offices. The warrants authorized the agents to search for and seize the following items (Pet. App. 99 (footnote omitted)):

> (1) demerol (mependine), morphine sulfate and other controlled substance[s]; (2) all records which document the purchasing, dispensing and prescribing of controlled substances, including, but not limited to, records contained in patient charts and all relevant records required to be maintained by Title 21 of the Code of Federal Regulations, Part 1300 to end and Sections 11190 and 11191 of the California Health and Safety Code; (3) patient logs, appointment books and other records and ledgers reflecting distribution of controlled substances[3]; (4) correspondence concerning the procuring, transferring, administering, prescribing or dispensing of controlled substances by [petitioner]; all of which constitute evidence of possible violations of 21 USC. 841(a)(1) and 21 USC 843(a)(3).

On July 29, 1982, agents and other officers executed the three warrants (Pet. App. 29).

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[3] In two of the warrants, that provision read: "patient logs, appointment books and other records and ledgers reflecting patient visits to [petitioner] or his employees, constituting evidence of illegal distribution of controlled substances."

2. Petitioner thereafter instituted a civil action for the return of the records, claiming, inter alia, that the search warrants were unconstitutionally overbroad. The district court held that while there was probable cause to issue a search warrant, the warrants issued here were too broad (Pet. App. 23). The court therefore ordered that the seized records be returned unless petitioner was indicted by February 1, 1983 (Pet. App. 27).

Petitioner was indicted on January 28, 1983 (Pet. App. 81). Prior to trial he moved, before a different district judge, to suppress the evidence seized on July 29. The district court held an extensive suppression hearing, and on September 28, 1983, the court denied petitioner's motion (Pet. App. 28-78).[4] The court held, first, that the warrants did not, as petitioner contended, authorize the seizure of all patient records, but rather limited the agents to records reflecting the prescription or distribution of controlled substances (Pet. App. 53-54). The court further held that it was not necessary to confine the warrants, as petitioner contended (Pet. App. 53), to the 58 profiles specified in the affidavit (Pet. App. 54). To the contrary, the court agreed (*ibid.*) that "[t]he affidavit establishes probable cause to believe that files other than those set forth in the affidavit would contain evidence of unlawful prescriptions of controlled substances." The court also observed (*ibid.*) that "[i]t would defy common sense to conclude that probable cause was limited solely to the records specifically referred to in the search warrant affidavit because of the inferences which may be drawn that defendant was prescribing controlled substances in violation of law over a period of several months at least and to many people." Finally, the district court concluded (Pet.

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[4] Petitioner did not contend at the hearing that the judgment in the prior civil action estopped the government from contesting his motion to suppress (Pet. App. 81-82).

App. 55-64) that any lack of particularity in the warrants was cured by the affidavits submitted in support of the warrants and, in any event, that a more precise description of the items to be seized was not possible.[5]

3. The court of appeals affirmed by a divided vote (Pet. App. 79-104). The court agreed with petitioner that because the affidavit had not been attached to the warrants, it could not be considered in determining whether the warrants were overbroad (Pet. App. 97-98). The court concluded, however, that the affidavit established sufficient probable cause to justify the search and seizure of a large volume of records (Pet. App. 99-101). In particular, the court held (Pet. App. 102-103) that the warrants need not have been limited to the 58 profiled patients identified by the medical examiner. "Such a conclusion," the court observed (Pet. App. 103), "ignores the magistrate's finding, unchallenged on appeal, of probable cause to seize all documents concerning controlled substances." Finally, the court rejected (Pet. App. 101-102) petitioner's claim that the warrants failed to provide standards for determining which files could properly be seized. The court noted (Pet. App. 101) that the warrants limited the seizure solely to those documents that reflected the distribution of controlled substances.[6]

Judge Pregerson dissented (Pet. App. 105-116). In his view, the warrant should have been restricted to the 58 patients and drugs expressly identified in the affidavits (Pet. App. 110-111). Judge Pregerson also believed that the warrants covering the Farmersville and Porterville offices

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[5] The court also rejected several other challenges to the search and seizure, which are not presented by the petition. Pet. App. 32-53, 65-78.

[6] The court also rejected various challenges to the trial court's instructions to the jury (Pet. App. 82-95). Petitioner does not renew these challenges in the petition.

were improper, in that they purportedly required the agents to determine whether an item was evidence of a narcotics violation before the item could be seized (Pet. App. 107-109).

ARGUMENT

1. Petitioner contends (Pet. 8-13) that the warrants were overbroad and should have been limited to the files of the 58 patients whom the medical consultant found to have received excessive prescriptions of Schedule II drugs. The court of appeals properly rejected this claim.

The Fourth Amendment particularity requirement is designed to prevent " 'general, exploratory rummaging in a person's belongings.' " *Andresen* v. *Maryland*, 427 U.S. 463, 480 (1976) (quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971)). But where the underlying affidavit establishes sufficiently broad probable cause, the warrant may authorize a comparably broad search and seizure. For example, in *United States* v. *Bright*, 630 F.2d 804 (5th Cir. 1980), the defendant contended that a search warrant should have been limited to currency bearing particular serial numbers, in view of the fact that the government knew before the search that currency with those serial numbers would be found in the defendant's house. Rejecting that contention, the Fifth Circuit held that because the government had established probable cause to search for more than those specific bills, the warrant was entitled to encompass all currency in the defendant's possession. 630 F.2d at 811-812.

More recently, the Eighth Circuit made the same point in *United States* v. *Kail*, 804 F.2d 441 (1986). There, the court upheld a warrant that permitted the seizure of "almost all of the [defendant's] business records." The court reasoned that "there was probable cause to believe that fraud permeated the entire business operation." 804 F.2d at 445.

The First Circuit took the same view in *United States* v. *Brien*, 617 F.2d 299, cert. denied, 446 U.S. 919 (1980). In that case the court of appeals approved a warrant that concededly covered most of the defendant's business records (617 F.2d at 306). The court determined that the affidavit in support of the warrants showed that the defendant's fraud was "so extensive as to justify a belief by the magistrate that all these documents were likely to constitute evidence of the crimes under investigation" (*ibid.*). Like petitioner, the defendant in *Brien* contended that the warrant should have been limited to the particular customers about whom the authorities had specific information. The First Circuit rejected that claim, noting (*id.* at 307-308) that there was a sufficient basis to believe that the defendant had engaged in similar practices with his other customers. Accord *United States* v. *Sawyer*, 799 F.2d 1494, 1508 (11th Cir. 1986) (holding that evidence of pervasive fraud justified a warrant that was not limited to the 25 transactions specified in the affidavit); *United States* v. *McClintock*, 748 F.2d 1278 (9th Cir. 1984), cert. denied, No. 84-1883 (Oct. 7, 1985); *United States* v. *Offices Known as 50 State Distributing Co.*, 708 F.2d 1371 (9th Cir. 1983), cert. denied, 465 U.S. 1021 (1984); *United States* v. *Hillyard*, 677 F.2d 1336 (9th Cir. 1982); *National City Trading Corp.* v. *United States*, 635 F.2d 1020 (2d Cir. 1980).

Here, the warrant (Pet. App. 99) confined the agents to searching for and seizing only "documents dealing with the distribution of controlled substances" (Pet. App. 101 (footnote omitted)). The court of appeals' fact-bound determination (Pet. App. 100-101, 102-103) that there was ample probable cause to justify such a search is correct.[7]

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[7] In assessing the sufficiency of probable cause this Court has made it clear that the issuing magistrate is to "make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, * * * there is a fair probability that contraband

The affidavit did not simply disclose 58 discrete cases of unwarranted narcotics distribution. Rather, the affidavit showed—particularly in its description of the experience of the undercover police officer—that petitioner routinely dispensed controlled substances to patients on demand, in the absence of the slightest indication of medical necessity. Thus, the issuing magistrate was entitled to infer, as the district court found (Pet. App. 54), that the 58 profiled cases of illegal dispensing of controlled substances represented merely "the tip of the iceberg" (*United States* v. *Brien*, 617 F.2d at 308).

The court of appeals' decision in this case is not in conflict with the decision of the Tenth Circuit in *Voss* v. *Bergsgaard*, 774 F.2d 402 (1985). There, the affidavit supporting the warrant alleged a scheme of tax fraud. The bulk of the warrant, however, was not restricted to evidence of tax fraud. Rather, it permitted the agents to search for evidence of "any federal crime" (774 F.2d at 404-405). Thus, while the court agreed that a search may properly embrace "all of an organization's records," the evidence in *Voss* did not justify so broad a warrant (*id.* at 406). In the present case, by contrast, the warrant authorized the seizure only of documents relating to the

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or evidence of a crime will be found in a particular place." *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). A reviewing court need only ensure that the magistrate had a "substantial basis" for finding that probable cause existed (*id.* at 238-239), bearing in mind that affidavits are to be reviewed "in a commonsense and realistic fashion" (*United States* v. *Ventresca*, 380 U.S. 102, 108-109 (1965)), and that the judgment of the issuing magistrate is entitled to considerable deference (*Ventresca*, 380 U.S. at 109; *United States* v. *McQuisten*, 795 F.2d 858, 861 (9th Cir. 1986); *United States* v. *Ellison*, 793 F.2d 942, 946 (8th Cir. 1986), cert. denied, No. 86-5484 (Nov. 3, 1986); *United States* v. *Lamport*, 787 F.2d 474, 476-477 (10th Cir. 1986), cert. denied, No. 85-7219 (Oct. 6, 1986); *United States* v. *Travisano*, 724 F.2d 341, 345 (2d Cir. 1983)).

purchasing, dispensing, and prescribing of controlled substances – for which both of the lower courts concluded that ample probable cause had been established.

Petitioner's reliance (Pet. 12-13) on *United States* v. *Abrams*, 615 F.2d 541 (1st Cir. 1980), is equally misplaced. The court of appeals in that case held that a search warrant that authorized the seizure of all of a doctor's medical records was overbroad. The court noted that the warrant provided utterly "no description as to what specific records are to be seized" (615 F.2d at 543). The agents were thus free to seize all of the records on the premises, and they did so (*id.* at 544). The court in *Abrams* acknowledged that an affidavit that establishes that "fraudulent practices were regularly pursued" could support "the seizure of all records of Medicare and Medicaid services billed" (*id.* at 545). The court concluded, however, that the affidavit at issue in that case did not provide probable cause for such a broad search (*id.* at 544 & n.7). The present case is distinguishable from *Abrams* on two grounds. First, as both courts below found, the probable cause in this case justified a broad warrant. Second, unlike the warrant in the *Abrams* case, the warrants in this case limited the search to a particular category of records – those that reflected the dispensing of controlled substances. The court of appeals' determination that the evidence recited in the affidavit justified the scope of the warrants in this case merits no further review.[8]

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[8] Petitioner relies (Pet. 8, 12) on the purported concessions of the prosecutor at oral argument in the court of appeals that the warrants should have been limited solely to Schedule II drugs and that the failure to limit them was a "mistake." Petitioner's reliance is misplaced. First, as the court of appeals observed (Pet. App. 103 n.2), the prosecutor conceded only that he had failed to review the *final* draft of the affidavits and warrants; he made clear that he had assisted in preparing the initial drafts. Moreover, the prosecutor did not agree that the warrants were legally overbroad; to the contrary, he insisted

2. Petitioner is likewise mistaken in his contention (Pet. 13-17) that the warrants were not sufficiently particularized to satisfy the requirements of the Fourth Amendment. Petitioner reasons, first (Pet. 14), that because two of the warrants permitted the agents to seize documents that "constitut[ed] evidence of illegal distribution of controlled substances," the agents were forced to "distinguish between legal and illegal distribution" and thus were left without sufficient guidance from the face of the warrants. But petitioner overlooks the fact, noted by the court of appeals (Pet. App. 104 n.3), that every document embraced by this allegedly improper category was also covered by the perfectly proper category, contained in each of the warrants, which called for all records reflecting the dispensing of narcotics. The law is clear that even if a portion of a warrant is overbroad, the overbroad portion may be severed and the evidence that was seized under the valid remainder may be admitted at trial. See *Andresen* v. *Maryland*, 427 U.S. 463, 482 n.11 (1976); *United States* v. *Faul*, 748 F.2d 1204, 1219 (8th Cir. 1984), cert. denied, 472 U.S. 1027 (1985); *United States* v. *Cardwell*, 680 F.2d 75, 78 (9th Cir. 1982). Thus, even if two of the warrants contained an overbroad clause, the valid remainder of those warrants entitled the agents to search for and lawfully seize the very same documents.

Petitioner is also mistaken in claiming that the warrants did not require a nexus between the items to be seized and probable violations of law. The affidavit established that petitioner was routinely dispensing narcotics to patients, regardless of any medical need and in the absence of any medical evaluation. Detailed profiles of some 75 of these patients confirmed that petitioner or his employees had prescribed excessive narcotics in more than three-quarters

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at oral argument (Pet. App. 104 n.4) that the affidavit established sufficient probable cause to justify warrants that covered all documents reflecting narcotics transactions.

of the profiled cases. In making the "practical, commonsense decision" entrusted to him (*Illinois* v. *Gates*, 462 U.S. 213, 238 (1983)), the magistrate was entitled to conclude that all of petitioner's documents relating to the dispensing of narcotics were likely to be evidence of violations of the narcotics law.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1987

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[9] The Eighth Circuit's decision in *In re Grand Jury Proceedings*, 716 F.2d 493 (1983), on which petitioner relies (Pet. 16-17), is easily distinguishable. In that case the court of appeals held unconstitutional a warrant that authorized the seizure of all of the records of the appellant's bail bonding business. The court noted (716 F.2d at 497) that the warrant was not limited to any category of documents and did not even identify "the offenses on which evidence was sought." Moreover, the court held (*id.* at 499-502) that the underlying affidavit did not provide sufficient probable cause for any search at all. Here, by contrast, the warrants limited the search and seizure to documents reflecting narcotics transactions; they specified the crimes for which the evidence was sought; and, as the courts below concluded, they were amply supported by probable cause.

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